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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 863

JOHN HALUN, *Petitioner*,

v.

EMORY M. JONES, SR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JOHN HALUN, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled cause on November 22, 1961.

OPINION BELOW

The opinion in the court below (Appendix A, *infra*, pp. A1-A4) has not yet been reported.

JURISDICTION

The judgment of the court below was entered on November 22, 1961.

Timely petitions for rehearing and for a rehearing in banc were denied on January 11, 1962 (Appendix B (1), (2), *infra*, pp. A4-A5).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

In an action by John Hahn for damages arising out of an automobile collision, the trial judge ruled as a matter of law that the owner was liable for the negligence of the permittee of the owner's son, and left to the jury only the question of damages. The Court of Appeals reversed and directed judgment for the owner.

The question presented is whether in view of the principles enunciated in *Quock Ting* v. *United States*, 140 U.S. 417, and in view of decisions of other Circuit Courts, the court below was justified in reversing the judgment and directing judgment for the owner; and whether, at the very least, the court below should not have ordered a new trial.

STATUTE INVOLVED

D. C. Code § 40-424 (1961) provides as follows:

> "Whenever any motor vehicle, after the passage of this chapter, shall be operated upon the public highways of the District of Columbia by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed to be the agent of the owner of such motor vehicle, and the proof of the ownership of said motor vehicle shall be

prima facie evidence that such person operated said motor vehicle with the consent of the owner."

STATEMENT

Emory M. Jones, Sr., bought an automobile on September 23, 1957. He told his son he could use the car, with two restrictions: first, the son would have to return the car by midnight and, second, no one was to drive the car but the son while it was in his possession. On Wednesday, October 2, 1957, the son used the car and kept it out beyond midnight. For this, the father kept the car from his son until Monday night, October 7, 1957. On this occasion, one Griffin was driving, with the son and others in the car, when at a speed of about 70 miles an hour and while fleeing from police, the car collided with and seriously injured John Halun. Halun sued the owner.

The trial court ruled as a matter of law that Griffin was operating the car with the owner's implied consent. The case went to the jury only on damages. From a judgment for Halun, the owner appealed. The court below reversed, entering judgment for the owner, saying (*infra*, p. A3): "In this case the evidence failed to show consent. The evidence that Griffin was operating the appellant's car at the time of the accident, and that the appellant had not consented to his operating it, was not met by any evidence to the contrary. If there had been substantial evidence that the appellant had consented, either expressly or by implication, there would have been a question for the jury. Since there was no such evidence, there was no such question. It could not rationally be thought that the appellee, who was the plaintiff, had discharged his burden of proof. It follows that the appellant was entitled to a directed verdict."

REASONS FOR GRANTING THE WRIT

First: This case, in following the rule previously laid down by the court below in cases arising under the Motor Vehicle Safety Responsibility Act [D. C. Code § 40-424 (1961)] ignores the classic statement of the law by this Court in *Quock Ting* v. *United States*, 140 U.S. 417. This it does in two important respects:

(1) The court below read the evidence in the instant case as requiring a directed verdict for the owner of the striking car. This evidence consisted solely of the testimony of the owner, his wife, and his son; that the son was not to allow anyone else to drive the vehicle. Obviously, such a restriction laid down in the privacy of the owner's family gathering, could not be directly contradicted by petitioner. But implicit in such self-serving testimony are all of the factors mentioned by this Court in *Quock Ting*, at page 420:

> "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

(2) More importantly, the lower court completely overlooked the fact—borne out by the owner's own testimony—that his son was known to him to be untrustworthy with respect to restrictions on the use of the car. Such a fact could conceivably convince a jury that the owner waived his restriction against driving by others, that the owner knew he could not rely on his son in this respect too. Surely, under the rule of the Supreme Court quoted above, such things could properly be considered by the jury (if they had originally, or on reversal, been given the issue of consent). Since the issue of consent was directed for petitioner at the trial, there has been no right afforded him either at the trial, nor by reversal accompanied by grant of a new trial, to have the trier of facts apply this Court's guides on this question.

It was just such rulings of the lower court in two of its earlier cases that led to criticism by Justices Rutledge and Stephens of that court. Justice Rutledge, in *Rosenberg v. Murray*, 73 App. D.C. 67, felt that the majority were invading the jury's province in passing upon the credibility of the car owner. Justice Stephens, in *Hiscox v. Jackson*, 75 U.S. App. D.C. 293, thought that *Rosenberg v. Murray* was wrongly decided in ignoring the proposition that the credibility and dependability of the owner's testimony—even uncontradicted—is for the jury.

Second. At least one other circuit has rendered a decision which conflicts with the instant case on the general legal question of liability of an owner for the negligence of his child's permittee, involving violation of a similar restriction on the child's use. While the case arrived in court on a collateral matter, *Glens*